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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

Mark Aussieker, individually and on behalf of  
others similarly situated,

Plaintiff,

v.

NEXA Mortgage, LLC,

Defendant.

CASE NO.: **2:21-cv-00281-TLN-AC**

**NEXA MORTGAGE, LLC'S ANSWER TO  
PLAINTIFF'S FIRST AMENDED CLASS  
ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

**Date Action Filed: July 23, 2021**  
**Trial Date: Not Yet Set**

Defendant, NEXA Mortgage, LLC ("Defendant" or "NEXA"), by and through the undersigned attorneys, hereby submits its Answer and Affirmative Defenses to the First Amended Complaint (the "Complaint") of Plaintiff Mark Aussieker ("Plaintiff") and avers as follows:

**NATURE OF THE ACTION**

1  
2 1. Admitted that Plaintiff brings this action pursuant to the Telephone Consumer  
3 Protection Act, 47 U.S.C. § 227 *et seq.* (“TCPA”). Defendant denies the remaining allegations of  
4 this Paragraph.

5 2. Admitted that NEXA provides mortgage broker lending to consumers. Defendant  
6 denies the remaining allegations of this Paragraph.

7 3. Defendant specifically denies that Plaintiff is entitled to injunctive relief or any other  
8 award of damages. Defendant also denies the remaining allegations of this Paragraph.

**JURISDICTION AND VENUE**

9  
10 4. The allegations contained in this Paragraph are legal conclusions to which no  
11 response is required. To the extent a response is required, Defendant does not challenge that this  
12 Court has jurisdiction over Plaintiff’s individual claims.

13 5. The allegations contained in this Paragraph are legal conclusions to which no  
14 response is required. To the extent a response is required, Defendant does not challenge that this  
15 Court has jurisdiction over Plaintiff’s individual claims. Defendant denies the remaining  
16 allegations of this Paragraph.

17 6. The allegations contained in this Paragraph are legal conclusions to which no  
18 response is required. To the extent a response is required, Defendant does not challenge that this  
19 Court has jurisdiction over Plaintiff’s individual claims. Defendant denies the remaining  
20 allegations of this Paragraph.

**PARTIES**

21  
22 7. Plaintiff’s allegations as to the residency of Plaintiff are legal conclusions to which  
23 no response is required. To the extent a response is required, Defendant lacks knowledge or  
24 information sufficient to form a belief as to the truth of the allegations of this Paragraph and  
25 therefore denies the allegations.

26 8. Admitted that NEXA is a limited liability company with its principal office located  
27 at 2450 S. Gilbert Road, Suite 210 Candler, AZ 85286.

28 9. Denied.

**THE TCPA**

10. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

11. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

12. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

13. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

14. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

15. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

16. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

17. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

18. The allegations contained in this Paragraph are legal conclusions to which no response is required. To the extent a response is required, this Paragraph characterizes a statute or regulation that speaks for itself and the allegations are therefore denied.

1           19.     The allegations contained in this Paragraph are legal conclusions to which no  
2 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
3 regulation that speaks for itself and the allegations are therefore denied.

4           20.     The allegations contained in this Paragraph are legal conclusions to which no  
5 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
6 regulation that speaks for itself and the allegations are therefore denied.

7           21.     The allegations contained in this Paragraph are legal conclusions to which no  
8 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
9 regulation that speaks for itself and the allegations are therefore denied.

10          22.     The allegations contained in this Paragraph are legal conclusions to which no  
11 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
12 regulation that speaks for itself and the allegations are therefore denied.

13          23.     The allegations contained in this Paragraph are legal conclusions to which no  
14 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
15 regulation that speaks for itself and the allegations are therefore denied.

16          24.     The allegations contained in this Paragraph are legal conclusions to which no  
17 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
18 regulation that speaks for itself and the allegations are therefore denied.

19          25.     The allegations contained in this Paragraph are legal conclusions to which no  
20 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
21 regulation that speaks for itself and the allegations are therefore denied.

22          26.     The allegations contained in this Paragraph are legal conclusions to which no  
23 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
24 regulation that speaks for itself and the allegations are therefore denied.

25          27.     The allegations contained in this Paragraph are legal conclusions to which no  
26 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
27 regulation that speaks for itself and the allegations are therefore denied.

28          28.     The allegations contained in this Paragraph are legal conclusions to which no

1 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
2 regulation that speaks for itself and the allegations are therefore denied.

3 29. The allegations contained in this Paragraph are legal conclusions to which no  
4 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
5 regulation that speaks for itself and the allegations are therefore denied.

6 30. The allegations contained in this Paragraph are legal conclusions to which no  
7 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
8 regulation that speaks for itself and the allegations are therefore denied.

9 31. The allegations contained in this Paragraph are legal conclusions to which no  
10 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
11 regulation that speaks for itself and the allegations are therefore denied.

12 **FACTS**

13 32. Defendant lacks knowledge or information sufficient to form a belief as to the truth  
14 of the allegations in this Paragraph, and therefore denies the allegations.

15 33. Defendant lacks knowledge or information sufficient to form a belief as to the truth  
16 of the allegations in this Paragraph, and therefore denies the allegations.

17 34. Denied.

18 35. Defendant lacks knowledge or information sufficient to form a belief as to the truth  
19 of the allegations in this Paragraph, and therefore denies the allegations.

20 36. Denied.

21 37. Defendant lacks knowledge or information sufficient to form a belief as to the truth  
22 of the allegations in this Paragraph, and therefore denies the allegations.

23 38. The allegations contained in this Paragraph are legal conclusions to which no  
24 response is required. To the extent a response is required, this Paragraph characterizes a statute or  
25 regulation that speaks for itself and the allegations are therefore denied.

26 39. Defendant lacks knowledge or information sufficient to form a belief as to the truth  
27 of the allegations in this Paragraph, and therefore denies the allegations.

28 40. Defendant lacks knowledge or information sufficient to form a belief as to the truth

1 of the allegations in this Paragraph, and therefore denies the allegations.

2 41. Denied.

3 42. Denied.

4 43. Defendant lacks knowledge or information sufficient to form a belief as to the truth  
5 of the allegations in this Paragraph, and therefore denies the allegations.

6 44. Denied.

7 45. Denied.

8 46. Denied.

9 47. Denied.

10 48. Defendant lacks knowledge or information sufficient to form a belief about the truth  
11 of the allegations in this Paragraph, and therefore denies the allegations.

12 49. Denied.

13 50. Denied.

14 51. Denied.

15 52. Defendant lacks knowledge or information sufficient to form a belief about the truth  
16 of the allegations in this Paragraph, and therefore denies the allegations.

17 53. Defendant lacks knowledge or information sufficient to form a belief about the truth  
18 of the allegations in this Paragraph, and therefore denies the allegations.

19 54. Plaintiff's allegation in this Paragraph are legal conclusions to which no response is  
20 required. To the extent that a response is required, this Paragraph characterizes a statute or  
21 regulation that speaks for itself and the allegations are therefore denied.

22 55. Defendant lacks knowledge or information sufficient to form a belief about the truth  
23 of the allegations in this Paragraph, and therefore denies the allegations.

24 56. Defendant lacks knowledge or information sufficient to form a belief about the truth  
25 of the allegations in this Paragraph, and therefore denies the allegations.

26 57. Denied.

27 58. Denied.

28 59. Defendant lacks knowledge or information sufficient to form a belief about the truth

1 of the allegations in this Paragraph, and therefore denies the allegations.

2 60. Denied.

3 61. Denied.

4 62. Denied.

5 63. Denied.

6 **CLASS ALLEGATIONS**

7 64. The allegations contained in this Paragraph are conclusions of law to which no  
8 response is required. To the extent a response is required, Defendant denies that any class is  
9 certifiable because it lacks the requirement of Fed. R. Civ. P. 23, including numerosity of class  
10 members, commonality of questions of law and fact, and typicality of claims, among other  
11 requirements.

12 65. The allegations contained in this Paragraph are conclusions of law to which no  
13 response is required. To the extent a response is required, Defendant denies that any class is  
14 certifiable because it lacks the requirement of Fed. R. Civ. P. 23, including numerosity of class  
15 members, commonality of questions of law and fact, and typicality of claims, among other  
16 requirements.

17 66. The allegations contained in this Paragraph are conclusions of law to which no  
18 response is required. To the extent a response is required, Defendant denies that any class is  
19 certifiable because it lacks the requirement of Fed. R. Civ. P. 23, including numerosity of class  
20 members, commonality of questions of law and fact, and typicality of claims, among other  
21 requirements.

22  
23 **NUMEROSITY**

24 67. Denied.

25 68. Denied.

26 **COMMON QUESTIONS OF LAW AND FACT**

27  
28 69. Denied.

1           70.     Denied.

2     **TYPICALITY**

3           71.     Denied.

4     **PROTECTING THE INTERESTS OF THE CLASS MEMBERS**

5           72.     Denied.

6     **PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE**

7           73.     Denied.

8           74.     Denied.

9                     **COUNT I**

10                    **Violation of the TCPA, 47 U.S.C. § 227(b)(1)(A)**

11                    **(On Behalf of Plaintiff and the Class)**

12           75.     Defendant repeats and incorporates by reference all prior paragraphs as if fully  
13     stated herein.

14           76.     The allegations contained in this Paragraph are legal conclusions to which no  
15     response is required. To the extent a response is required, this Paragraph characterizes a statute or  
16     regulation that speaks for itself. The allegations are therefore denied.

17           77.     Denied.

18           78.     Denied.

19           79.     Denied.

20           80.     Denied.

21           81.     Denied.

22                     **COUNT II**

23                    **Violation of the TCPA, 47 U.S.C. § 227(b)(1)(C)**

24                    **(On Behalf of Plaintiff and the Class)**

25           82.     Defendant repeats and incorporates by reference all prior paragraphs as if fully  
26     stated herein.

27           83.     The allegations contained in this Paragraph are legal conclusions to which no  
28     response is required. To the extent a response is required, this Paragraph characterizes a statute or



1 regulation that speaks for itself. The allegations are therefore denied.

2 84. Denied.

3 85. Denied.

4 86. Denied.

5 87. Denied.

6 88. Denied.

7 **COUNT III**

8 **Knowing and/or Willful Violation of the TCPA, 47 U.S.C. § 227(b)**  
9 **(On Behalf of Plaintiff and the Class)**

10 89. Defendant repeats and incorporates by reference all prior paragraphs as if fully  
11 stated herein.

12 90. Denied.

13 91. Denied.

14 92. Denied.

15 93. Denied.

16 **AFFIRMATIVE DEFENSES**

17 The following defenses are based on Defendant's knowledge, information, and belief at this  
18 time. Defendant reserves the right to assert additional affirmative or other defenses and/or to  
19 modify, amend, or supplement any defenses contained herein at any time. Without admitting any  
20 allegations in the Complaint, Defendant asserts the following affirmative defenses. By setting forth  
21 these defenses, Defendant does not assume the burden of proving any fact, issue, or element of a  
22 cause of action where such burden properly belongs to Plaintiff. Furthermore, all defenses are  
23 pleaded in the alternative, and do not constitute an admission of liability or that Plaintiff is entitled  
24 to any relief whatsoever.

25 1. The TCPA is unconstitutional under federal and state law.

26 2. Plaintiff and the members of the proposed class lack standing to sue under the TCPA  
27 because they have not suffered any injury in fact as a result of the challenged conduct.

28 3. The Complaint, and each and every cause of action alleged therein, is barred on the

1 grounds that Plaintiff gave his prior express consent to be contacted.

2 4. The claims of Plaintiff and any members of the putative class are barred, in whole or  
3 in part, by the doctrine of ratification and because Plaintiff and/or any members of the putative class  
4 acquiesced to any conduct engaged by NEXA.

5 5. The claims of Plaintiff and any members of the putative class are barred, in whole or  
6 in part, by their own conduct, actions, inactions, which constitute estoppel of all claims and relief  
7 sought.

8 6. To the extent the claims of any members of the putative class arose prior to the  
9 applicable prescriptive or statutory period, those claims are barred, in whole or in part, by the  
10 statute of limitations under 28 U.S.C. § 1658(a).

11 7. The damages alleged in the Complaint (if any) were not caused by NEXA but were  
12 caused by one or more third parties whose activities were not approved, ratified, or controlled by  
13 NEXA.

14 8. All conduct and activities of NEXA alleged in the Complaint complied with and  
15 conformed to all applicable laws, statutes, government regulations, and industry standards based  
16 upon the state of knowledge existing at the times alleged in the Complaint. By way of further  
17 explanation, NEXA reasonably and in good faith believes that the Plaintiff was contacted pursuant  
18 to and in compliance with the TCPA as Plaintiff opted-in to be contacted. To the extent that NEXA  
19 is mistaken as to the manner in which Plaintiff's contact information was collected, other third  
20 parties should be found liable for Plaintiff's damages, to the extent any exist, and not NEXA.

21 9. The Complaint fails to state facts that would entitle Plaintiff and members of the  
22 proposed class to obtain injunctive relief because, among other reasons, there is no threat of  
23 immediate and/or continuing harm.

24 10. The Complaint fails to state facts sufficient to warrant treble damages for alleged  
25 willful and knowing violations of the TCPA and pertinent regulations.

26 11. The Complaint fails to state facts that would permit recovery of attorney's fees.

27 12. Plaintiff's allegations directed to Defendant NEXA are not sufficient to be "willful"  
28 because the alleged actions were not carried out by NEXA, and, at all relevant times, NEXA

1 believed that any and all actions of any third parties were lawful. Further, to the extent that any  
2 violation of the TCPA occurred, it resulted from a bona fide error, and was not willful or knowing.

3 13. To the extent Plaintiff and/or any member of the putative class suffered any  
4 damages, which NEXA expressly denies, Plaintiff and/or any member of the putative class failed to  
5 mitigate their damages.

6 14. The Court lacks personal jurisdiction over the claims of putative class members who  
7 are not California citizens.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, having fully answered the Amended Complaint, NEXA prays for judgment  
10 as follows:

- 11 A. That the Court deny Plaintiff's request to certify the proposed classes under Rule 23;  
12 B. That the Plaintiff take nothing by virtue of the Complaint;  
13 C. That the Complaint be dismissed with prejudice and judgement be entered in favor  
14 of NEXA;  
15 D. That the Court award NEXA attorney's fees and costs, as allowed by law; and  
16 E. That the Court award NEXA such other and further relief as it deems just and  
17 proper.  
18

19 Dated: August 27, 2021

HAYES SCOTT BONINO ELLINGSON  
GUSLANI SIMONSON & CLAUSE LLP

21 By /S/ Cherie M. Sutherland  
22 STEPHEN M. HAYES  
23 CHERIE M. SUTHERLAND  
24 Attorneys for Defendant  
NEXA MORTGAGE, LLC.

**DEMAND FOR JURY TRIAL**

Defendant NEXA Mortgage, LLC hereby demands a trial by jury.

Dated: August 27, 2021

HAYES SCOTT BONINO ELLINGSON  
GUSLANI SIMONSON & CLAUSE LLP

By /S/ Cherie M. Sutherland  
STEPHEN M. HAYES  
CHERIE M. SUTHERLAND  
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